

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Request for Stay)
of Cleanup and Abatement Order for)
Big Hole Project, Cosumnes River)
Association and Professional Security)
Service, Inc. of the California)
Regional Water Quality Control Board,)
Central Valley Region. Our File)
No. A-284.)

Order No. WQ 81-6

WQ
81-6

BY THE BOARD:

On November 14, 1980,^{1/} the California Regional Water Quality Control Board, Central Valley Region (Regional Board) adopted a cleanup and abatement order for Big Hole Project, Cosumnes River Association and Professional Security Service, Inc. The cleanup and abatement order alleges that Professional Security Service, Inc. (Professional), as operator of a gold mining venture called Big Hole Project, removed vegetation, constructed a diversion channel, excavated holes, and deposited debris where it could be discharged into the Middle Fork of the Cosumnes River. The order required Professional and Cosumnes River Association (Association), as the owner of the Project, immediately to begin stabilization and restoration of the stream to its original configuration. The order required complete restoration by November 30 and submission of a compliance report by December 8.

On December 16, the State Water Resources Control Board (State Board) received a petition from Francis Lindsay and

1. All dates herein refer to 1980, unless otherwise noted.

Professional Security Service, Inc. seeking review of the order and a stay of its effect. Lindsay is an agent for Professional.

BACKGROUND

The Big Hole Project is a gold mining venture operated on the Middle Fork of the Cosumnes River. The venture was regulated by both the Department of Fish and Game and the Regional Board. Professional executed a Streambed Alteration Agreement with the Department of Fish and Game, which was effective from May 2 through November 30. The Agreement permitted Professional to divert the Middle Fork of the Cosumnes River and required Professional to take certain actions including returning the stream to its original configuration by November 30.

On October 24, the Regional Board issued waste discharge requirements for the mining operation in Order No. 80-165.^{2/} The requirements provided, in part, that the direct discharge of process waters and the operation of equipment in or near free flowing water, causing turbidity, are prohibited. The requirements expired on November 30 and provided that any subsequent operation of the site would require the filing of a new report of waste discharge.

In the cleanup and abatement order, which is the subject of the petition, the Regional Board found that staff inspections

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2. On that same date the Regional Board also adopted Order No. 80-164, directing staff to refer the matter to the Attorney General. Therein, it was alleged that Professional began mining operations and discharged pollutants to the stream in early October, notwithstanding the absence of any waste discharge requirements. A complaint was filed on December 4.

on October 31 and November 13 revealed that work had not begun on stabilization or rehabilitation of the mining operation area.

In a related development, Sierra Properties Corporation (Sierra) agreed to take certain steps to restore the site in anticipation of mining the site the following year.^{3/} Sierra stated that if drilling tests confirmed the economic viability of further mining operations and if Sierra were permitted to mine in 1981, it would post a bond, provide funds to "winterize" the site, meet the water quality requirements set for Professional and complete restoration of the site. The steps comprising "winterization" were outlined by Alfred Thym, Sierra's engineer, in a letter to the Department of Fish and Game dated November 17. "Winterization" was intended to stabilize the site during the winter months, but was not to constitute complete restoration.

A Streambed Alteration Agreement was executed between the Department of Fish and Game and Sierra on November 25. Pursuant to this agreement, Sierra was to "winterize" the site. "Winterization" was to be completed by December 13. The agreement specifically stated that it did not alter the terms of the Streambed Alteration Agreement between Professional and the Department of Fish and Game.

3. Letter to Department of Fish and Game from Gerald L. Davey, president of Sierra, dated November 4.

REQUEST FOR STAY

Section 2053(a) of the State Board's regulations provides:

"A stay of the effect of an action of a regional board shall be granted only if petitioner alleges facts and produces proof of

- (1) substantial harm to petitioner or to the public interest if a stay is not granted,
- (2) a lack of substantial harm to other interested persons and to the public interest if a stay is granted and
- (3) substantial questions of fact or law regarding the disputed action.

A petition for a stay shall be supported by affidavit of a person or persons having knowledge of the facts alleged. Upon a documented showing by petitioner that he complies with the prerequisites for a stay, the state board will hold a hearing. A request for a stay may be denied without a hearing. If a hearing is held, notice shall be given to such manner and to such persons, in addition to the petition, as the board deems appropriate."

The petitioners seek a stay of the cleanup and abatement order. The request is accompanied by the affidavit of John Cunningham, president of Professional Security Services, Inc. The petitioners argue that they will suffer substantial harm if a stay is not granted, that no substantial harm will be incurred by other interested persons if a stay is granted, and that substantial questions of law and fact exist.

In arguing that they will suffer substantial harm, the petitioners claim that they could become subject immediately to enforcement actions. In his affidavit, Cunningham states that compliance with the cleanup and abatement order is not possible during the winter and that if restoration were attempted, discharges to the stream might occur. Such discharges, Cunningham

claims, could cause Professional to be subject to enforcement action. Likewise, without a stay, Professional would be subject to legal action for violation of the cleanup and abatement order if it did not attempt restoration.

Professional's argument appears to focus on its inability to implement full restoration of the stream during current winter conditions. As adopted, however, the cleanup and abatement order required Professional to complete this work by November 30--prior to the onset of winter conditions. If Professional did not, in fact, comply with the order, that circumstance should not be a reason for staying the effect of the order. The fact that Professional may be subject to action by the Regional Board to enforce the cleanup and abatement order during our review of the petition does not constitute substantial harm to Professional. Any other result would leave the Regional Board without the ability to seek relief against Professional in the event of environmental damage during the current winter caused by Professional's failure to restore the site.

Cunningham further declares any attempt to comply with the cleanup and abatement order could subject Professional to action by the Department of Fish and Game. We do not see how this could occur, since both the Regional Board order and the Streambed Alteration Agreement between Professional and the Department required restoration by November 30. In addition, the agreement executed by the Department and Sierra specifically provides that it does not alter the effect of the agreement between the

Department and Professional. We therefore cannot conclude that Professional will incur liability with the Department by complying with the cleanup and abatement order.

In addition to concluding that Professional will not suffer substantial harm if a stay is not granted, we also fail to see the merit in Professional's claim that granting of a stay will not result in substantial harm to other interested persons or to the public.

In support of its argument of a lack of substantial harm to others if a stay is granted, Professional states that "winterization" is the most that can now be accomplished during the winter season, and that if a stay were granted, Professional would remain liable for full restoration of the site.

We do not find these arguments sufficient evidence of lack of harm to others. As we have stated above, the inability of Professional to complete restoration at this time is not grounds for excusing it from liability for failure to comply timely with the order. Professional has submitted no evidence to show that the failure to restore the site does not pose a threat of environmental damage to the public. We also disagree with Professional's argument that by granting a stay of the order, it will still be subject to enforcement by the Regional Board. While monetary remedies would be available if the cleanup and abatement order is ultimately upheld, the Regional Board would be precluded from seeking injunctive relief during our review. As stated above, this would unnecessarily tie the Regional Board's hands. We therefore conclude that Professional has not made a

showing that if a stay were granted there would be a lack of substantial harm to the public and to other interested persons.

While we do find that the petition does present substantial issues of law and fact, this alone is not a sufficient basis to grant a stay of the cleanup and abatement order.

CONCLUSIONS

The petitioner has not produced documented proof that it complies with the prerequisites for a stay. The request, therefore, must be denied. This Board, in a subsequent order, will address the merits of the contentions raised in the petition.

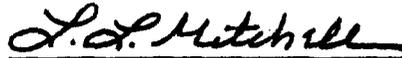
ORDER

IT IS HEREBY ORDERED that the request for stay of Cleanup and Abatement Order for Big Hole Project, Cosumnes River Association and Professional Security Service, Inc. is denied.

DATED: March 19, 1981



Carla M. Bard, Chairwoman



L. L. Mitchell, Vice-Chairman



Jill B. Dunlap, Member

Absent

F. K. Aljibury, Member

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